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硕 士 学 位 论 文

释明：“理想话语情境”的构建

——以司法可接受性为思考方向

Judicial Interpretation: Creating of “Ideal Discourse

Situation”

——The Judicial Acceptance for Thinking Direction

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内容提要

释明是大陆法系民事诉讼法理论和立法上一个十分重要的概念和制度,其功能在于纠正绝对当事人主义带来的诉权滥用、程序复杂、裁判迟延等缺陷。随着各国民事诉讼改革的不断深入,两大法系民事诉讼模式呈现出不断融合的趋势,司法改革的共同方向即从“司法福利”这一观念出发,以“协同主义”为指导来重新配置和实践民事审判权,释明的产生与发展正是顺应了这一趋势。

我国的民事审判方式改革方兴未艾,在转型时期特殊纠纷处理文化下,法官的角色融入了政治因素,在个案处理上更注重纠纷的彻底解决。而纠纷的解决需要有效沟通及沟通渠道的畅通,释明权作为职权主义的积极因素,有助于促进当事人与当事人之间、法官与当事人之间的理性沟通。基于释明与我国转型时期司法需求的契合,本文以司法的可接受性为思考方向,通过对域外释明理念的博采和本土先进经验的汲取,提出了程序保障型释明理念及其具体构建,旨在通过规范而有效的释明,创设一个更为开放,有序、安定、畅通的“理想话语情境”,实现审判权与诉权的有效对接,全面回应纠纷解决的民众可接受性。

本文除引言及结论外,共分为四章。第一章我国释明运作的现实样态和问题呈现。该章通过典型案例实证分析了释明在我国司法实践中的具体样态,在简介释明的内涵和功能预设的同时,着重分析了不当释明的具体类型、危害及成因,引出本文所关注的实践问题。第二章释明理念的域外溯源和理性思辨。该章不仅通过对德、法等国释明制度和英、美等国相关制度的介绍,阐述了域外释明制度的创设源于对古典辩论主义(或对抗制)理念的适度修正,还深入分析了域外释明理念的发展。第三章转型时期我国释明理念的定位。该章分析了释明理念与转型时期特定司法需求的因应及与当前司法政策的契合,指出司法实践中不当释明现象的理念根源,并提出问题解决的思路----“程序保障型释明理念”的确立和具体定位。第四章释明的制度构建与工作方法。该章是对“程序保障型释明理念”的制度

化建构和工作方法的探索。

关键词：释明；可接受性；程序保障

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ABSTRACT

The system of judicial interpretation is a basic rule of the civil lawsuit of the Continental legal system countries. The ration of this system is to effect limitations and modifications to the adversary system, make up for the defects caused by the adversary system in terms of the unfairness, delay and the increasing of costs in the litigation process. With the deep of civil law suit reformation in the world, the civil law suit Pattern of the two legal systems show the tendency of combination, it is a choice in common of both the two legal system countries to strengthen the judicial interpretation. And only under the mode of principle of cooperation, judicial interpretation could bring into play it's role plenary in the procedure of trial.

Now, our civil trial model is In the period of Transformation, and constituting the system of the judicial interpretation has a grand meaning. If it is exerted properly, it may add up the Parties'active co-operation and it may avoid the unreasonable factors coming from the argumentum' s being exerted automatically and formally. But the scholars generally only Pause the system of judicial interpretation research in the introduction and description, have not conducted the thorough research. This situation directly caused in the legislation gaps and omissions, and confusion in the judicial interpretation.

This paper, besides the introduction and conclusion, which can be divided into four chapters. The first chapter: the practice and present problems of the judicial interpretation, Through an empirical analysis of the typical case, The author introduce problems of the judicial interpretation on legislation and practical aspect in our country and he analysis the reason of the improper practice of the judicial interpretation,The second chapter :The ComParison Analysis: history of The Legislation and practice of the judicial interpretation. the author introduces the leglslation and practice of Continental Law System

and Common Law System. The third chapter: Judicial interpretation concept positioning In the period of Transformation. the author raise concrete imagination of establishing judicial interpretation in procedure safeguard model. The The fourth chapter :Exercise program and system construction of judicial interpretation in china.The author raise the theoretical base,the legislative mode, the practice method and remedy system of the judicial interpretation in our country. It is worth mentioning the author raise the practice interpretation method with “Emotion,nous,law”, aims to regulate and effective judicial interpretation, creating a more open, orderly, stability, expedite "ideal discourse situation" and realize effective rooting of both the judicial authority and the litigation, and comprehensive response to resolve disputes public acceptance.

Key words: Judicial interpretation, Judicial acceptance, Procedural justice

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